JD(NY)–42—04
Watertown, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

SALMON RUN SHOPPING CENTER, LLC

and **Case No. 3-CA-24578**

EMPIRE STATE REGIONAL COUNCIL OF CARPENTERS, LOCAL 747

Alfred Norek, Esq., Counsel for the General Counsel.
Peter Carmen, Esq., MacKenzie, Hughes, LLP, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on July 28, 2004 in Syracuse, New York. The Complaint herein, which issued on January 28, 2004 and was based upon an unfair labor practice charge and an amended charge that were filed on November 26, 2003[1] and January 8, 2004 by Empire State Regional Council of Carpenters, Local 747, herein called the Union, alleges that since on about August 13, Salmon Run Shopping Center, LLC, herein called the Respondent, has refused to permit the Union to distribute literature within its facility, while permitting other organizations to do so, in violation of Section 8(a)(1) of the Act.

Findings of Fact

I. Jurisdiction

The Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization Status

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

The Respondent operates an enclosed retail shopping mall, the largest in the area, with ninety five retail tenants and approximately 3,500 outdoor parking spaces, in Watertown, New York. Historically, the Respondent has allowed local organizations to set up displays at the mall if one or two requirements are satisfied: if the solicitation increases customer traffic at the mall or it enhances the mall's reputation and public image. The instant matter arose because the Respondent refused to allow the Union to set up a table and hand out Union literature at the mall. The two witnesses herein were Ronald Timmerman, council representative for the Union,

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2003.

and Mary Dudo, the general manager of the mall. Timmerman testified about the Union's interest in soliciting at the mall and the Respondent's denial of his request, and Dudo testified about the criteria that the Respondent uses in determining who should, and who should not, be permitted to solicit at the mall, as well as different organizations that the Respondent has allowed to solicit, and those it has not allowed to solicit. There is no dispute about the facts herein.

On August 13, Timmerman went to the mall and met with the mall's marketing director, Karla Woods and told her that the Union would like to set up a table at the mall to hand out Union literature. She gave him a certificate of insurance to complete and told him to submit a letter giving two dates that they would like to have. On August 22, Timmerman submitted a letter to Woods requesting September 13 or September 27, and attached a certificate of liability insurance. On August 29, he called Woods and said that he had not yet received a response to his request, and she said that she had been on vacation and would get back to him the following week. Not having heard from Woods, he went to see her on September 19 and told her that he was still waiting for a response to his request. Woods told him that she had never previously received a request from a union, and would have to contact her corporate office for advice, and would get back to him the following week, but she failed to do so. Timmerman went to the mall on September 29 and saw several tables set up with displays of Syracuse University and other universities, as well as a bank and an accounting firm. He then went to see Dudo and asked why he had not received a response to his request while these other organizations had displays at the mall. She told him that it was for their higher education night, and he told her that the Union had an apprenticeship program which they consider education for young people to learn about the trade and employment benefits. When Dudo did not respond, he asked her if his request wasn't approved because it was a union request, and she told him that she would look at the request, and get back to him, but she never did. On October 7, Woods called him and told him that they had not had any previous requests for access from a union, and that they believed that the Union was a profit organization and that his request was being denied. On April 7, 2004 Timmerman mailed a completed Community Access Form to Dudo with an accompanying letter notifying her that the Union had not previously been aware that the form was required. By letter dated April 14, 2004, Dudo notified Timmerman that his application was not approved:

> Our community action program, since its inception, remains a partnership program that serves to benefit both the members of our local community and the Salmon Run Mall's tenants. We welcome civic, charitable, or other organizations to solicit in the common areas of the Mall when the solicitation will benefit both the organization and our tenants.

Timmermam testified that his request to set up a display at the mall was generated by his learning that Dick's Sporting Goods, which was becoming a tenant at the mall, and had hired a contractor who was non-union and, allegedly, did not pay area standard wages. This contractor was being employed by Dick's to remodel its new facility at the mall and Timmerman wanted to distribute literature to notify the public about the contractor that Dick's was employing and the fact that it was not paying area standards wages. However, in denying the Union's request for a display at the mall, the Respondent never inquired as to what it intended to distribute. In addition, if the Union had been granted permission to set up a display at the mall, they would have distributed information regarding their apprenticeship program, as well as Union literature regarding the advantages of employing union contractors. The mall does not employ any carpenters and the Union's intended audience for its distribution was the general public, not the employees of the mall or its tenants. There is no allegation, or proof, herein that the Union did not have other available means of getting its message to the public.

Timmerman, who lives about thirty miles from the mall, visits the mall about twice a

month for shopping or work related trips, although the Union does not represent any of the employees employed at the mall. On these visits he has observed displays for the Little League, Boy Scouts, hospices, the Childrens' Miracle Network, the American Cancer Society and the Salvation Army at Christmas time, as well as others that he could not recollect.

Dudo testified that she determines whether community organizations will be allowed to set up a table at the mall to distribute literature. The two primary factors in determining whether solicitation requests are approved are whether it increases the foot traffic into the mall or enhances its public image in support of the community. Examples of displays are the Childrens' Miracle Network, the Salvation Army, and the American Cancer Society, which enhance the mall's public image. In addition, the mall has a Higher Education Night, sponsored by the local Board of Education, which benefits the mall by increasing the foot traffic into the mall. The mall has rejected applicants other than the Charging Party. It rejected a request by a Howard Dean campaign group to hold a forum at the mall and rejected an application from a church group wishing to publicize the movie "The Passion of Christ." It was determined that these applications be rejected because they would not benefit the mall. The mall also rejected an application for the Miss New York State Pageant that wanted to have a bake sale because it would compete with the products of mall tenants, and likewise rejected a request from Sam's Club to set up a table to recruit new applicants, because they are a competitor of mall tenants.

Dudo testified that the mall does not have a policy of rejecting all solicitation requests from unions. They would grant a union's request to set up a table if it was a fundraiser in support of a charity or an educational program. For example, in May 2002, the Food Workers' Union, which represents workers at a local hospital, participated in a health fair event with their own table at the mall. Their display notified the public of the good food served at the hospital as well as employment opportunities at the hospital. The request of the Union herein stated that they wanted to distribute Union literature, and the request was denied because their requested display did not provide any benefit to the mall.

Three roads, town and state, lead into the mall. In addition, Watertown, New York has its own radio stations as well as a newspaper.

IV. Analysis

Counsel for the General Counsel and counsel for the Respondent both cite *Sandusky Mall Co.,* 329 NLRB 618 (1999) in their briefs, although counsel for the Respondent's cite is to the Court case, *Sandusky Mall Co. v. NLRB*, 242 F3d 682 (6th Cir. 2001) which disagreed with the Board's reasoning and refused to enforce its decision. *Sandusky* is an appropriate case to cite because it is almost a mirror image of the instant matter. In *Sandusky*, a mall with approximately 96 stores, the union learned that a tenant remodeling its store was employing a non-union contractor that did not pay the prevailing area union wage rate and benefits. As a result, the union handbilled at the entrance to that store asking the general public not to patronize the store because, by employing that contractor, "they are undermining construction wage and benefit standards in this area." The handbilling was peaceful and did not block ingress or egress from the store. The handbillers left after being asked to do so by a mall security guard, but returned the next day, when they were given a letter saying that they would not be permitted to handbill on private property and, if they did so, it would be considered trespassing and would be dealt with accordingly. Two weeks later, when they returned, they were arrested and charged with trespassing.

The only difference between the instant matter and *Sandusky* is that in the instant matter, rather than actually handbilling, the Union requested permission to set up a table at the

mall, which request was denied. Other than that, the facts are, virtually, identical. Like the Respondent, *Sandusky* permitted charitable, civic and other organizations to solicit on its premises, permitting, *inter alia*, United Way, Easter Seals, The American Lung Association, the Salvation Army and the Red Cross, and required these organizations to apply in order to solicit and, if permission were granted, the applicant had to sign a temporary display agreement. Among the factors considered by *Sandusky* was whether the mall would receive an economic benefit, such as rent, good will or increased customer traffic, whether the display was consistent with, or conflicted with, the business of the mall and its tenants, and whether it would be controversial or divisive. *Sandusky* refused numerous requests to solicit, including removing political campaign stickers and pins, and prohibited the distribution of flyers for commercial interests, in competition with its tenants, as well as flyers which it deemed to be sensitive material. The majority of the Board, in finding that *Sandusky* violated the Act, discussed *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956) and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), stating:

> Relying on *Lechmere*, however, the Respondent contends that the nonemployee union handbillers had no protected right of access to the Respondent's private property. We disagree. Although the Supreme Court in *Lechmere* held as a general rule that an employer cannot be compelled to allow the distribution of union literature by nonemployee organizers on its property, it did not disturb the discrimination exception articulated in *Babcock & Wilcox*. As correctly stated by the General Counsel in this case, the Board has frequently relied on that exception, in cases decided after *Lechmere*, in holding that an employer violated Section 8(a)(1) of the Act by denying union access to its property while permitting other individuals, groups and organizations to use its premises for various activities.

The Board noted that the United States Court of Appeals for the Sixth Circuit, which subsequently refused to enforce its decision, disagreed with the Board's interpretation of "discrimination" as used in *Babcock & Wilcox* in *Cleveland Real Estate Partners v. NLRB*, 95 F3d 457 (6th Cir. 1996) :

> The Sixth Circuit denied enforcement of the Board's order, holding that, post- *Lechmere* "discrimination" as used in *Babcock & Wilcox* "means favoring one union over another, or allowing employer-related information while barring similar union-related information." We respectfully disagree with the Sixth Circuit's conclusion and adhere to our view that an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation.

In response to *Sandusky's* defense that it did not discriminate against the union, *per se*, but that it denied it access pursuant to its consistent discretionary policy of limiting access to those groups that would benefit the mall, as the Respondent did herein, the Board stated:

> [W]e find the Respondent's policy of permitting access based on its discretion and business judgment is unlawfully discriminatory vis-a-vis union solicitation of customers. The Respondent prohibited the dissemination of a message protected by the Act while at the same time permitting the dissemination of a wide range of other messages. In prohibiting the union's protected area standards handbilling, the Respondent is distinguishing among solicitation based on its own assessment of the message to be conveyed according to its purely subjective standard. This practice "amounts to little more than an employer permitting on its property solicitation that it likes and forbidding solicitation that it dislikes." [citing *Riesbeck Food Markets*, 315 NLRB 940, 942 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996).]

In answer to *Sandusky's* defense that it had also denied access to other nonunion individuals and groups, as the Respondent defends herein, The Board stated:

> The Act does not protect those nonunion activities, so the Respondent may ban any or all of them. What the Respondent cannot do, however, is prohibit the dissemination of messages protected by the Act on its private property while at the same time allowing substantial civic, charitable and promotional activities. That is exactly what the Respondent did.

As stated above, the Court refused to enforce the Board's Order in *Sandusky.* The principal disagreement between the Board and the Sixth Circuit involves the interpretation of the following language from *Babcock & Wilcox*, at p. 112:

> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message, and if the employer's notice or order does not discriminate against the union by allowing other distribution.

In *Cleveland*, at 464-465, the Sixth Circuit explained its difference with the Board about the meaning of this language:

> To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so. Although the Court has never clarified the meaning of the term, and we have found no published court of appeals cases addressing the significance of "discrimination" in this context, we hold that the term "discrimination" as used in *Babcock* means favoring one union over another, or allowing employer-related information while barring similar union-related information.

While recognizing that the Court of Appeals for the Sixth Circuit disagrees with the Board's interpretation of post-*Lechmere* "discrimination" and refused to enforce *Sandusky* and *Cleveland* for that reason, I am bound by the most recent Board decision which the Supreme Court has not reversed. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); *Waco, Inc.*, 273 NLRB 746 at fn. 14 (1984). I therefore find that by refusing to permit the Union to solicit on its premises, while allowing other organizations, including a union, to do so, the Respondent violated Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by refusing to grant the Union permission to solicit at the Salmon Run Shopping Center while allowing other organizations to do so.

The Remedy

Having found that the Respondent violated Section 8(a)(1) of the Act by refusing to allow the Union to set up a table and solicit at its mall in Watertown, New York, I shall recommend that it cease and desist from doing so, and to post a notice stating that it will grant access to the Union in the same manner as it grants access to any other organization or group.

Upon these findings of fact and conclusions of law, and based on the entire record herein, I issue the following recommended[2]

ORDER

The Respondent, Salmon Run Shopping Center, LLC, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Denying access to the Union to distribute literature at the Salmon Run Mall, while permitting other organizations to do so.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its facility in Watertown, New York copies of the attached Notice marked "Appendix."[3] Copies of the Notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees and tenants are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to the Union and all current employees and former employees employed at the mall at any time since August 13, 2003.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

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Joel P. Biblowitz
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT deny access to representatives of Empire State Regional Council of Carpenters, Local 747, ("the Union"), or any other labor organization, to distribute literature at the Salmon Run Mall, ("the Mall") while permitting other organizations and groups to do so.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL grant the Union access to distribute literature at the Mall in the same manner as we permit other organizations and groups to do so.

SALMON RUN SHOPPING CENTER, LLC
(Employer)

Dated_____ **By**_____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901, Buffalo, NY 14202-2387

(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.